

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of Daniel J. Pomrenke

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) George A. Beck on September 24 and November 6, 2002 at the Office of Administrative Hearings, in Minneapolis, Minnesota. The record closed on December 4, 2002 with the filing of the parties' post-hearing briefs and closing arguments.

Michael J. Tostengard, Assistant Attorney General, NCL Tower, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota, 55101-2130, appeared on behalf of the Department of Commerce ("Department"). Robert B. Bauer, Attorney at Law, Severson, Sheldon, Dougherty & Molenda, P.A., 7300 West 147th Street, Suite 600, Apple Valley, Minnesota 55124-7580, appeared on behalf of Daniel J. Pomrenke ("Respondent").

NOTICE

This Report is a recommendation and not a final decision. The Commissioner of the Minnesota Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 (2000), the final decision of the Commissioner shall not be made until this Report has been made available to the parties for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact James C. Bernstein, Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, telephone (651) 296-7107 to inquire about filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this report becomes a final decision. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.

STATEMENT OF ISSUE

Whether disciplinary action should be taken against Respondent based on allegations that he engaged in deceptive or dishonest acts and made false, deceptive or misleading statements or representations in connection with a residential loan transaction.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. At all times relevant to this matter, Daniel J. Pomrenke ("Respondent") was employed as a loan officer by Real Estate Funding, Inc. ("Real Estate Funding"), located at 2121 Cliff Drive, Suite 120, Eagan, Minnesota 55122.^[1] Real Estate Funding is licensed by the Minnesota Department of Commerce as a mortgage loan originator.

Pomrenke Loan

2. In January 2001, Mr. Pomrenke prepared and submitted to Paragon Bank a residential loan application on behalf of himself and his wife, Connie Pomrenke.^[2] On the application, Mr. Pomrenke identified his employer as "Homestar USA" and his position as "manager/ReMax". Mr. Pomrenke represented that he had been employed at Homestar USA for four years. Homestar USA is licensed as a mortgage originator and has an office located in the same building as Real Estate Funding. Mr. Pomrenke identified his wife's employer as "Sterling Optical" and her position as "optometrist". In addition, Mr. Pomrenke listed his wife's cell phone number on the application as the business phone number for Sterling Optical. Mr. Pomrenke further represented on the loan application that he and his wife had no dependents. And Mr. Pomrenke identified Steven Watts, the president of Real Estate Funding, as the person who took their loan application based on a "face-to-face interview."^[3]

3. The Pomrenkes' loan application was not signed or dated.^[4]

4. Mr. Pomrenke has never been employed at Homestar USA.^[5]

5. Connie Pomrenke is not now and has never been licensed as an optometrist by the Minnesota Board of Optometry.^[6]

6. The Pomrenkes' have one child.^[7]

7. Mr. Watts did not prepare the Pomrenkes' loan application nor did he conduct a face-to-face interview with the Pomrenkes in connection with their loan application. Mr. Watts was in Florida during the time that the Pomrenkes' loan application was prepared and submitted.^[8]

8. Michael Hart is the vice president of Paragon Bank's Shakopee office. Mr. Hart acts as the bank's branch manager, supervising a small staff and underwriting consumer loans. Mr. Hart received and processed the Pomrenkes' loan application.^[9]

9. Mr. Hart was familiar with Daniel Pomrenke having worked with him and Real Estate Funding on a previous loan transaction.^[10]

10. As part of the Pomrenkes' loan application, Mr. Hart received title work from Colonial Title representing that the Pomrenkes' primary residence was subject to only one mortgage. Based on this information, Mr. Hart believed that Paragon Bank would be in second lien position on the Pomrenkes' home should the Pomrenkes default on their loan.^[11]

11. According to the note and security agreement signed by the Pomrenkes on January 31, 2001, the loan's purpose was for a "2nd mortgage". In addition, the collateral for the loan was identified as "the property pledged under a mortgage".^[12]

12. The Pomrenkes' outstanding second mortgage was listed on their credit report, which was part of the loan application's supporting documents.^[13]

13. Mr. Hart approved the Pomrenkes' residential loan application in the amount of \$63,269.09 and funded the loan on February 5, 2001. Paragon Bank obtained a consumer mortgage (junior lien) on the Pomrenkes' primary residence located at 13604 Bryant Place, Burnsville, Minnesota. Under the terms of the mortgage, the property was represented to be "unencumbered, except for encumbrances of record."^[14]

Fecho Loan

14. In January 2001, Mr. Pomrenke prepared and submitted to Paragon Bank a residential loan application on behalf of William and Cheryl Fecho.^[15] The purpose of the loan was for a "2nd mortgage/home improvements".^[16] The loan application listed Ms. Fecho's employer as "PFG, Inc." and her position as "chief estimator, construction". The business telephone number listed for Ms. Fecho is the same number listed on Mr. Pomrenke's loan application for Homestar USA.^[17]

15. There is no entity in Minnesota by the name of "PFG, Inc."^[18]

16. Ms. Fecho is employed as a receptionist at Real Estate Funding.^[19]

17. As part of the Fechos' loan application, Mr. Hart received title work on the Fechos' primary residence from Colonial Title. The title work initially showed that the Fechos had two outstanding mortgages on their home. Colonial Title, however, subsequently faxed to Mr. Hart revised paperwork indicating that the Fechos' second mortgage had been paid off and should be deleted from the title work. Based on this representation, Mr. Hart believed that Paragon Bank would have second lien position on the Fechos' home should they default on their loan.^[20]

18. Mr. Hart approved the Fechos' residential loan application in the amount of \$57,282.29 and funded the loan on January 31, 2001. Paragon Bank obtained a consumer mortgage (junior lien) on the Fechos' primary residence located at 13341 Morgan Avenue South, Burnsville, Minnesota. Under the terms of the mortgage, the property was represented to be "unencumbered, except for encumbrances of record."^[21]

19. Shortly after the Pomrenkes' and the Fechos' loans were funded, an insurance agent informed Mr. Hart that both the Pomrenkes' and the Fechos' primary residences had two outstanding mortgages instead of one as stated on their title work. Consequently, Paragon Bank was in third lien position on the Pomrenkes' and Fechos' homes.^[22]

20. Mr. Hart telephoned Mr. Pomrenke and asked him about the disputed title information on his and the Fechos' loan applications. Mr. Pomrenke told Mr. Hart that he had directed the closer at Colonial Title to delete the existing second mortgages off both applications' title work. Mr. Pomrenke stated that he should not have done this and that he would rectify the situation.^[23]

21. Paragon Bank demanded that the Pomrenkes and the Fechos pay off their loans immediately based on the false information in their loan applications.^[24]

22. By letter dated March 12, 2001, Mr. Hart notified Mr. Pomrenke that the payoff for his loan as of March 16, 2001 was \$63,995.80.^[25]

23. By letter dated March 12, 2001, Mr. Hart informed Mr. Pomrenke that the payoff for the Fechos' loan as of March 21, 2001 was \$58,108.95.^[26]

24. The Pomrenkes' and the Fechos' loans were paid in full by Real Estate Funding.^[27]

25. Mr. Hart filed a "suspicious activity" report with the Minnesota Department of Commerce regarding both the Pomrenke and Fecho loan transactions.^[28]

26. On April 8, 2002, the Department filed and served on Daniel Pomrenke a Notice of and Order for Hearing. The Notice alleged that Mr. Pomrenke demonstrated that he was untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act as a mortgage loan originator, in violation of Minn. Stat. §§ 45.027, subd. 7(4) (2000) and 58.12, subd. 1(b)(2)(v) (2000); engaged in fraudulent, deceptive, or dishonest acts in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(iv); and made false, deceptive, or misleading statements or representations in connection with a residential loan transaction in violation of Minn. Stat. § 58.13, subd. 1(9) (2000) thereby providing grounds for disciplinary action.

CONCLUSIONS

1. Any of the foregoing Findings of Fact more properly termed Conclusions are adopted as such.

2. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter pursuant to Minnesota Statutes §§ 14.50, 45.027 and 58.12 (2000).

3. The Respondent was given proper and timely notice in this matter.

4. The Department has complied with all relevant substantive and procedural requirements of statute and rule.

5. Pursuant to Minn. Stat. § 45.027, subd. 7(4), the Commissioner may deny, suspend, or revoke the authority or license of a person if the Commissioner finds that the person has engaged in an act or practice which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.

6. Pursuant to Minn. Stat. § 58.12, subd. 1(b)(2)(iv), the Commissioner may bar a person from engaging in residential mortgage origination or servicing, or deny, suspend, or revoke a residential mortgage originator license if he finds that the residential mortgage originator, servicer, applicant, or other person, an officer, director, partner, employee, or agent has "violated a standard of conduct or engaged in a fraudulent, coercive, deceptive or dishonest act or practice, whether or not the act or practice involves the residential mortgage lending business."

7. Pursuant to Minn. Stat. § 58.12, subd. 1(b)(2)(v), the Commissioner may bar a person from engaging in residential mortgage origination or servicing, or deny, suspend, or revoke a residential mortgage originator license if he finds that the residential mortgage originator, servicer, applicant, or other person, an officer, director, partner, employee, or agent has engaged in an act or practice that demonstrates untrustworthiness, financial irresponsibility, or incompetence.

8. Pursuant to Minn. Stat. § 58.13, subd. 1(9), no person acting as a residential mortgage originator or servicer, including a person required to be licensed under this chapter, and no person exempt from the licensing requirements of this chapter under section 58.04, shall make any false, deceptive, or misleading statement or representation in connection with a residential loan transaction.

9. Minn. Stat. § 58.04, subd. 1(b)(1) exempts from licensure any person who is an employee of a mortgage originator licensee.

10. At all times relevant to this matter, Mr. Pomrenke was employed as a loan officer at Real Estate Funding, Inc., which is licensed as a mortgage loan originator with the Department of Commerce.

11. Mr. Pomrenke is exempt from the licensing requirements of chapter 58, but remains subject to all other provisions of chapter 58. ^[29]

12. Respondent has engaged in fraudulent, deceptive, or dishonest acts by preparing and submitting residential mortgage loan applications containing false, deceptive or misleading statements in violation of Minn. Stat. §§ 58.12, subd. 1(b)(2)(iv), and 58.13, subd. 1(9). By doing this, Respondent has demonstrated that he is untrustworthy or otherwise incompetent to act engage in residential mortgage origination or servicing in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(v).

13. The Department has met its burden of establishing violations of Minn. Stat. §§ 58.12, subs. 1(b)(2)(iv) and 1(b)(2)(v), and 58.13, subd. 1(9) (2000), by a person, agent or employee of a residential mortgage originator and such violations are grounds for disciplinary action.

14. The Department has failed to establish a violation of Minn. Stat. § 45.027, subd. 7(a)(4), as Respondent is neither a licensee nor an applicant for licensure.

15. This order is in the public interest.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED:

That the Commissioner of Commerce take disciplinary action against Daniel J. Pomrenke.

Dated this 20th day of December 2002.

S/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

Reported: Tape-recorded (3 tapes).

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The Department of Commerce seeks to take disciplinary action against Daniel J. Pomrenke for engaging in fraudulent or dishonest acts and for making false or misleading statements in connection with two residential mortgage loan applications. At all times relevant to this matter, Mr. Pomrenke was employed as a loan officer by Real Estate Funding, which is licensed by the Department as a mortgage loan originator. The Department established that Mr. Pomrenke prepared and submitted two residential loan applications that contained false employment information and that Mr. Pomrenke directed an employee at Colonial Title to omit existing second mortgages on both applications' title work.

Respondent argues that the Department lacks jurisdiction to regulate or discipline him under Minn. Stat. § 45.027, subd. 7(a)(4) because, according to Respondent, this provision applies only to applicants for licenses or those already licensed. Subdivision 7 is entitled "Actions against licensees". It states in pertinent part that the commissioner may deny, suspend, or revoke the authority or license of a person if the commissioner finds that:

(4) the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the *applicant or licensee* is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified, to act under the authority or license granted by the commissioner. (Emphasis added.)

Because Respondent is neither an applicant nor a licensee, he contends that Minn. Stat. § 45.027, subd. 7(a)(4) is inapplicable. Respondent further argues that the Department lacked the authority to proceed under Minn. Stat. § 45.027 and that since it did so, all of the allegations, including those involving violations of Minnesota Statutes chapter 58, should be dismissed as unwarranted. In addition, Respondent asserts that the Department failed to establish the specific allegations concerning the Fechos' loan application. Respondent maintains that there is not "a single piece of paper or evidence submitted into the record to indicate that Pomrenke had *any* involvement with the Fecho loan." And Respondent questions why the Department never took a sworn statement from Mr. Hart or investigated his actions more closely in connection with the loan transactions. Finally, Respondent argues that the Department's failure to produce 172 pages from its investigative file until after it rested on the first day of the hearing

prejudiced Respondent's ability to conduct effective cross-examination of the Department's witnesses.

As already discussed in the ALJ's Order of August 21, 2002, the Department has general authority over the mortgage origination industry that is broader than its specific authority over licensees. There is no dispute that the provisions of Minnesota Statute chapter 58 apply to Respondent. Minn. Stat. § 58.05, subd. 1, states specifically that persons exempt from licensing requirements, such as Mr. Pomrenke, are still subject to all the other provisions of the chapter. Mr. Pomrenke is exempt from licensure because he is an employee of a licensed mortgage originator.^[30] Additionally, Minn. Stat. § 58.12 gives the Commissioner the authority to regulate persons, employees, or agents of a residential mortgage originator.^[31] Since Mr. Pomrenke was an employee of a licensed mortgage originator, the Commissioner has the authority to regulate him under Minnesota Statutes chapter 58.

The Department has established that Mr. Pomrenke prepared and submitted to Paragon Bank both his own and the Fechos' loan applications containing false employment and title information. Contrary to Respondent's claim that there is no evidence to support a finding that Mr. Pomrenke had any involvement with the Fechos' loan, Mr. Pomrenke's signature appears on Mr. Fecho's employment verification form in the space marked "signature of lender" with "processor" given as his job title.^[32] In addition, both Mr. Hart and Ms. Costello testified that Mr. Pomrenke represented to them that he had prepared both loan applications. The ALJ also found Mr. Hart's testimony that Mr. Pomrenke admitted to him that he had directed someone at Colonial Title to delete the existing second mortgages from the applications' title work to be credible. Accordingly, the Department has established that Mr. Pomrenke prepared and submitted both residential loan applications and in so doing made false, deceptive or misleading statements or representations in violation of Minn. Stat. § 58.13, subd. 1(9). The Department has further established that by his conduct, Mr. Pomrenke engaged in fraudulent, deceptive, or dishonest acts in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(iv) and that he is therefore untrustworthy or otherwise incompetent to engage in mortgage loan origination or servicing in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(v).

In addition, Respondent's argument that all of the allegations should be dismissed because the Department commenced this action under the authority of Minn. Stat. § 45.027, subd. 6, is without merit. This statute authorizes the Commissioner to impose a civil penalty upon "a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner." Minn. Stat. § 45.011, subd. 4, defines "duties and responsibilities entrusted to the commissioner" as including the administration of Minnesota Statutes Chapters 45 to 83. Mr. Pomrenke is a person who has violated Minn. Stat. §§ 58.12 and 58.13. The administration of Minnesota Statutes Chapter 58 is part of the Commissioner's duties and responsibilities. Because Mr. Pomrenke has violated statutes that the Commissioner administers, the Department had the authority to proceed under Minn. Stat. § 45.027, subd. 6.

Likewise, Minn. Stat. § 45.027, subd. 7, provides generally that the Commissioner may deny, suspend, or revoke the authority of "a person subject to the duties and responsibilities entrusted to the commissioner." The administration of

Minnesota Statutes chapters 45 and 58 is part of the Commissioner's duties and responsibilities.^[33] As an employee of a licensed mortgage originator, Mr. Pomrenke is "a person" subject to Minnesota Statutes chapters 45 and 58. And as such, he is a person against whom the Commissioner may take disciplinary action. Accordingly, Minn. Stat. § 45.027, subd. 7 applies to Mr. Pomrenke.

However, Respondent's argument that Minn. Stat. § 45.027, subd. 7(a)(4), is inapplicable to him because he is neither an applicant nor a licensee has merit. Minn. Stat. § 45.027, subd. 7(a)(4), states that the Commissioner may take disciplinary action against the authority or license of a person if the person has engaged in an act that demonstrates that "the applicant or licensee" is untrustworthy or otherwise incompetent or unqualified to act under the authority granted by the Commissioner. Mr. Pomrenke is neither an applicant nor a licensee. Although it is likely that this provision's limitation to applicants and licensees is simply the result of inartful drafting on the part of the legislature, particularly given the otherwise broad definitions of persons subject to the Commissioner's authority found at Minn. Stat. §§ 58.12, 58.13, and 45.027, subd. 7, it nevertheless renders Minn. Stat. § 45.027, subd. 7(a)(4) inapplicable to Respondent. Accordingly, the ALJ finds that the Department failed to establish that the Respondent violated Minn. Stat. § 45.027, subd. 7(a)(4).

Respondent also argues for the first time in his post-hearing brief that the Department did not have the authority to compel Mr. Pomrenke to appear before the ALJ in this contested case hearing. In its Order for Hearing, the Department notified Respondent that he was required to appear at a prehearing conference "pursuant to Minn. Stat. § 45.027, subd. 6 and 7 (2000)." Respondent points out that Minn. Stat. § 45.027, subd. 7(b) provides that the Commissioner shall issue an order requiring a "licensee or applicant for a license to show cause why the license should not be revoked, or suspended, or the licensee censured, or the application denied." Again, Respondent asserts that, because he is neither an applicant nor a licensee, the Department lacked jurisdiction to compel him to appear at any enforcement proceeding. The Administrative Law Judge is not persuaded by this argument. The Commissioner has the authority to impose civil penalties or take disciplinary action against "a person" under Minn. Stat. § 45.027, subds. 6 and 7. Either action requires the Commissioner to conduct a hearing in accordance with chapter 14.^[34] Therefore, the Department had the authority under Minn. Stat. § 45.027, subds. 6 and 7, to compel Respondent to appear before the ALJ at the prehearing conference and hearing in this matter.

Finally, the Administrative Law Judge finds Respondent's claim of prejudice to be without merit. During the hearing it was discovered that the Department had failed to turn over its complete investigative file to Respondent in violation of the ALJ's prehearing order and discovery rules. The ALJ ordered the Department to turn over the missing documents and continued the hearing for approximately 1 and ½ months. The ALJ finds that the continuance remedied any potential prejudice that may have resulted from the Department's failure to produce its complete investigative file. The continuance of the hearing gave Respondent sufficient time to examine the missing documents and to prepare effective cross-examinations of the Department's witnesses.

The record supports taking disciplinary action against Daniel J. Pomrenke. Imposition of a sanction lies within the discretion of the Commissioner.^[35]

G.A.B.

^[1] Respondent's Memorandum in Support of Motion to Dismiss at 2.

^[2] Ex. 1; Testimony of Hart and Costello.

^[3] Ex. 1-2 to 1-4; Testimony of Costello.

^[4] Ex. 1-4.

^[5] Testimony of Costello.

^[6] Ex. 3; Testimony of Costello.

^[7] Ex. 1-12.

^[8] Testimony of Costello.

^[9] Testimony of Hart.

^[10] Testimony of Hart.

^[11] Exs. 1-33 to 1-37, 1-74 to 1-77; Testimony of Hart.

^[12] Exs. 1-71 to 1-77.

^[13] Ex. 1-87.

^[14] Ex. 1-74.

^[15] Ex. 2-68 (William Fecho's verification of employment form was signed by Mr. Pomrenke as the lender and "processor"); Testimony of Hart and Costello.

^[16] Ex. 2-29 to 2-32.

^[17] Compare Ex. 1-2 with Ex. 2-2.

^[18] Testimony of Costello.

^[19] Testimony of Costello.

^[20] Exs. 2-38, 2-55 to 2-63; Testimony of Hart.

^[21] Ex. 2-14.

^[22] Testimony of Hart.

^[23] Testimony of Hart.

^[24] Testimony of Hart.

^[25] Ex. 1-83.

^[26] Ex. 2-37.

^[27] Testimony of Hart.

^[28] Testimony of Hart.

^[29] Minn. Stat. §§ 58.04, subd. 1(b)(1) and 58.05, subd. 1.

^[30] Minn. Stat. § 58.04, subd. 1(b)(1) exempts from licensure any person who is an employee of a licensed mortgage originator.

^[31] Minn. Stat. § 58.12, subd. 1(a) and (b).

^[32] Ex. 2-68.

^[33] Minn. Stat. § 45.011, subd. 1.

^[34] Minn. Stat. § 45.024, subd. 1.

^[35] *In re Insurance Agents' Licenses of Kane*, 473 N.W.2d 869, 877 (Minn. App. 1991), *rev. denied* (Minn. September 25, 1991).